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No. 87-326

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

G.D. SEARLE & CO.,
Petitioner,

v.

DEBRA A. AND GEORGE SIMON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

THOMAS W. BRUNNER *
JEFFREY F. LISS
LAURA A. FOGGAN
PIPER & MARBURY
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 785-8150
Attorneys for Amicus Curiae
American Insurance Association

* Counsel of Record

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MOTION OF THE AMERICAN INSURANCE ASSOCIATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36.3, the American Insurance Association ("AIA") hereby moves this Court for leave to file the attached *amicus curiae* brief in support of G.D. Searle & Co.'s ("Searle") request for a writ of certiorari in this case.*

AIA is a trade association comprising approximately 177 property and casualty insurance companies. AIA's

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* Searle has consented to the filing of an *amicus curiae* brief by the American Insurance Association and the written consent of its counsel has been lodged with the Clerk's office today. Respondents Debra A. and George Simon, et al., have declined to consent to the filing of the proposed *amicus curiae* brief.

member companies provide much of the liability insurance written in the United States. AIA seeks leave to appear as an *amicus curiae* because this case presents issues of substantial importance to the insurance industry and the public that affect the confidentiality of critical insurance carrier and policyholder records.

This case concerns the discoverability of aggregate and average case reserves in mass tort litigation. Although the petitioner in this case, Searle, is not an insurer, it functioned like a self-insurer in setting individual, aggregate and average case reserves. The reserve-setting process is crucial to the health and orderly functioning of the insurance industry. For this reason, AIA is uniquely qualified to explain and present to the Court the ramifications of the ruling below for the setting of reserves, as well as the potential implications of that ruling for the insurance industry. The petition for a writ of certiorari filed by Searle does not address these questions directly, nor are they likely to be addressed adequately by the respondents.

Accordingly, AIA respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari.

Respectfully submitted,

THOMAS W. BRUNNER *
JEFFREY F. LISS
LAURA A. FOGGAN

PIPER & MARBURY
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 785-8150

Attorneys for Amicus Curiae
American Insurance Association

* Counsel of Record

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BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF *AMICUS CURIAE*

The American Insurance Association ("AIA") is a trade association of approximately 177 property and casualty insurance companies. AIA's interest in this case, which is set forth in detail in its motion for leave to file preceding this *amicus curiae* brief, stems from the substantial importance to the insurance industry and the public of the Eighth Circuit's ruling concerning the discoverability of aggregate and average case reserves in mass tort litigation. AIA is uniquely qualified to address that ruling's implications for the confidentiality of crucial insurance carrier and policyholder records.

SUMMARY OF ARGUMENT

This case presents a recurring, important policy issue affecting discovery in tens of thousands of cases: are the ordinary protections of the work product doctrine and the attorney-client privilege lost to a corporate litigant when it must defend so many tort claims that those claims significantly affect its business? In this case, the lower courts answered this question affimatively.

Following a practice widespread among corporations facing mass tort claims (and one similar to insurance industry practice), Searle set individual, aggregate and average case reserves for its anticipated litigation exposure and occasionally adjusted those reserves. The courts below acknowledged that both the attorney-client privilege and work product immunity barred disclosure of the individual case reserves and their supporting documentation. They held discoverable, however, aggregate and average reserve data for all such claims that Searle faces. Nothing in the opinions below suggests that disclosure of that information serves any legitimate need of the tort plaintiffs.

Instead, the Eighth Circuit predicated its ruling solely on two unsound premises. First, over vigorous dissent and without detailed analysis, it assumed that aggregate and average reserves disclose nothing of value to opposing counsel. As AIA reviews below, that assumption is incorrect.

Second, the Eighth Circuit held that, when the volume and importance of tort litigation make it a meaningful business concern, a corporation forfeits the traditional protections afforded other litigants, at least as to major parts of its litigation work product such as reserve data. This doctrine would confound the basic premise of litigation work product confidentiality in a setting in which it is particularly important. Documents reflecting *bona fide* litigation preparation should not be discoverable

merely because the litigation has major financial implications.

Unless overturned by this Court, the 2-1 holding of the Eighth Circuit will create uncertainty throughout the United States. Not only manufacturing companies like Searle will be affected. The open-ended notion that, when business "involves litigation" (App. 8), traditional litigation protections are stripped away potentially could apply to the work of insurers who, as part of their business, manage litigation for their policyholders and who must by law reflect their litigation judgments in reserves. Particularly since lower courts have divided on the discoverability of reserve information, that question, potentially presented in most of the burgeoning number of mass tort and other products liability cases in the federal courts, requires the Court's determination.

ARGUMENT

This case concerns the extent to which a corporate defendant may be compelled to "tip its hand" to mass tort plaintiffs regarding its "reserves," the projections it has made concerning its exposure. Although this case directly involves reserve setting by a product manufacturer, it has significant implications for the reserve process in the insurance industry as well.[1] AIA reviews in turn the contours of the insurance industry's reserves process which may well be affected by this case, the implications of compelled disclosure of reserve information, and the pitfalls of the lower courts' analysis of the work product and attorney-client protections. AIA

[1] As explained by the court below, Searle maintains a risk management department to monitor its products liability litigation and analyze its litigation reserves. (App. 2.) Searle's risk management department is also responsible for the company's insurance coverage. Because Searle's product liability insurance has a high deductible component, the company acts like a self-insurer to a significant degree, and its activities in dealing with reserves are somewhat analogous to those of an insurer. (App. 2-3.)

closes by suggesting that the Court should resolve the conflict in the lower courts regarding this recurring issue of importance to a large and rapidly expanding category of federal litigation.

I. The Reserves Process

The setting of reserves is critical to the insurance industry, policyholders, and the public in general. This Court long ago recognized the "special meaning in the law of insurance" attributed to the term "reserves":

> [I]n general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside—"reserved"—as a fund with which to mature or liquidate, either by payment or by reinsurance with other companies, future unaccrued contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

Maryland Casualty Co. v. United States, 251 U.S. 342, 350 (1920). Reserves thus represent a "set-aside" fund for contingent and highly uncertain liabilities. Indeed, an insurance carrier sets reserves for unknown claims that have been incurred but not reported because it knows actuarially that such claims will be asserted. Applied in the context of tort claims lodged against a policyholder, an insurer's reserves are predictions of the litigated or negotiated results of those claims only in the most general sense. They are sometimes fixed by formula or in bulk and often are based on preliminary, available information. In reality, reserves are set aside to make certain that the insurer will be in a position to satisfy all of its currently hypothetical and uncertain obligations, as they actually mature into payable obligations.[2]

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[2] *See generally* S. Huebner, *et al.*, *Property and Liability Insurance* 607-13 (3d ed. 1982) (discussion of insurers' reserve-setting process).

Nonetheless, in the mass tort context particularly, reserves necessarily begin with an assessment of the merits of the tort claims, and adjustments in reserves often respond to changes in that assessment. The setting of case reserves is an inexact science[3] in which claims personnel—who often are, or work in conjunction with, attorneys—use available information to make judgments about potential liability and the potential magnitude of any award or settlement. These judgments obviously entail reflection on the strengths and weaknesses of each side's case in ongoing or anticipated litigation. The fact that such assessments are sensitive and confidential is apparent from their nature.

The public interest in achieving the greatest possible accuracy and honesty in the setting of reserves is also obvious. With a publicly-held manufacturer involved in large-scale litigation, financial information available to management and investors may be seriously distorted if adequate reserves are not posted. If insurance companies fail to set aside sufficient reserves, not only the companies but their policyholders and unrelated claimants against their policies also will suffer. The process is so important that numerous states require and regulate insurers' setting of reserves. *See* 2A G. Couch, *Couch on Insurance 2d* § 21:35 (2d ed. 1984).

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[3] For example, one court has noted that:

> When the "event" intended to be covered cannot easily be fixed and the liability for consequent injury extends long into the future, often well after expiration of the policy, considerations of inflation, upward spiraling jury awards, and legislative and judicial adoption of newly developing concepts of tort law mean that actuarial factors, including fixing premium rates and establishing adequate reserves, are highly speculative.

Stine v. Continental Cas. Co., 419 Mich. 89, 349 N.W.2d 127, 131 (1984).

II. The Impact of Reserve Disclosure

The court below properly found individual case reserves to be fully protected from discovery. It recognized that those reserves "embody the attorney's estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations and other factors." (App. 6.) The court below concluded, however, that aggregate and average reserves "dilute" the protected individual case reserve information they necessarily comprise to such an extent as to extinguish applicable work product and attorney-client protections.[4] Without detailed analysis, the court reasoned that, when aggregate or average reserves are disclosed, no "mental impressions, thoughts and conclusions of an attorney" are revealed.

This assumption is unsound in many instances, most obviously, because it ignores the realities of modern mass tort litigation. In recent years, sophisticated steering committees of plaintiffs' counsel[5] with substantial re-

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[4] The suggestion that, because protected information is "diluted," the attorney-client privilege is rendered inapplicable has no foundation. The attorney-client privilege is not a qualified protection which can be overcome by a showing that the need for protection is somehow diminished. Nor is this the test for overcoming work product immunity. To the contrary, work product materials are discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Even after that required showing has been made, "the Court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* In this case, there has been no suggestion of any need or undue hardship to the plaintiff to support discovery of aggregate or average reserve information.

[5] The United States Court of Appeals for the Third Circuit, in a ruling that affects as many as 125 cases pending against tobacco companies nationwide, recently upheld rulings permitting plaintiffs' attorneys to share with lawyers in similar cases documents

sources have been created to share and sift carefully all available evidence. Advanced computer technology is used to compile and analyze information. Sharing of discovery information in mass tort cases is also promoted by court procedural mechanisms such as multi-district litigation, class actions, and the consolidation of cases.

Indeed, this case directly involves forty-nine of the Cu-7 product liability cases, which were consolidated for discovery in the United States District Court for the District of Minnesota. (App. 2.) Moreover, plaintiffs' counsel in the Cu-7 cases against Searle have established a clearinghouse for discovery information and actively coordinate their efforts through the Cu-7 Litigation Steering Committee of the American Trial Lawyers Association. (Petition at 4.) The organized discovery efforts that are widespread in modern mass tort litigation underscore the extent to which aggregate and average reserves are likely to reveal protected thought processes.[6]

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obtained in discovery. *Cipollone v. Liggett Group*, 822 F.2d 335 (3d Cir. 1987). A United States District Court in Colorado approved similar discovery information-sharing among plaintiffs' attorneys in fuel system integrity cases against automobile manufacturers in *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982). The formation of information clearinghouses and steering committees of plaintiffs' counsel in mass tort litigation is increasingly common. *See, e.g.*, Galante, *Zomax Document Release Disputed*, The National Law Journal, April 22, 1985, at 10 (plaintiffs' lawyers sharing discovery in hundreds of lawsuits over Zomax, a painkiller recalled by McNeilab, Inc.); Cook, *Trial Lawyers to Focus on Tort Reform*, The National Law Journal, July 21, 1986, at 3 (members of plaintiffs' executive committee in the Bhopal litigation discuss coordination, planning and discovery at ATLA meeting); Galante, *Discovery: Walking in the Valley of Stealth, Unusual Paths Are Cheap, Fast*, The National Law Journal, Feb. 11, 1985, at 1 (references to Blatt & Fales' coordination of discovery for asbestos plaintiffs in 39 states and to proliferation of computer databases offering valuable information).

[6] Judge Gibson of the Eighth Circuit, who was a prominent Kansas City trial attorney before his appointment to the bench, noted this concern in his dissent. (App. 21-22.)

Attorneys' thought processes may also be revealed by aggregate and average reserves in other, more direct ways. For example, as noted in its Petition at 3, Searle has prevailed in most of its Cu-7 IUD litigation. If nonetheless it has set large aggregate reserves, disclosure of that fact would enable opposing counsel to ascertain that Searle fears large losses. That fact would affect litigation strategy, settlement negotiation, and the filing of additional claims. Similarly, adjustments in reserve levels after a major litigation development (e.g., a verdict in the initial case, a key legal ruling, or a critical deposition) necessarily would reflect and reveal the judgment of Searle's lawyers regarding the significance of the news.

In general, since mass tort suits, like most personal injury claims, typically seek only the recovery of money damages, estimates of the amounts ultimately payable in such damages, and changes in those estimates as events unfold are fertile fields for the kinds of inappropriate inquiry this Court first proscribed in *Hickman v. Taylor*, 329 U.S. 495 (1947). As a result, AIA believes that the lower courts failed to appreciate the sensitivity of aggregate and average reserves. The ruling below, compelling the disgorgement of aggregate and average reserve information compiled by a self-insurer, would, if extended to the insurance industry, undercut the entire reserves process.

In ordering disclosure of aggregate and average reserve information, the courts below truncated the proper stages of analysis. Initially, there is no suggestion in any of the opinions below that the information sought is "relevant" to the plaintiffs' case within the meaning of Rule 26(b)(1) of the Federal Rules of Civil Procedure. That information is not admissible evidence nor is it "reasonably calculated to lead to the discovery of admissible evi-

dence."[7] The disclosure would serve no legitimate need of the tort plaintiff. Certainly, none is suggested by the lower courts.

Rather than initially addressing the relevance of the information sought, the courts below proceeded directly to fashion a novel and dubious exception to both the work product doctrine and the attorney-client privilege. The Eighth Circuit enunciates the new concept that the work product protection falls away when a company's business "involves litigation" at least where the otherwise protected information reflects litigation judgments only in "an indirect and diluted manner." (App. 8-9.) It predicates its conclusion on various cases and commentaries that distinguish documents prepared in the "ordinary course of business" from those arising in the conduct of litigation. None of those authorities supports the notion that large-scale litigation *becomes* unprotected "business" whenever that litigation is important enough to have business implications.

Searle clearly prepared the reserve information with litigation in mind. Indeed, the documents are *about* litigation. Similarly, there appears to be little dispute that attorneys were involved significantly in the reserves process and that "[t]he risk management documents reflected attorney-client communications running in two directions." (App. 10.) Yet the court below overrode the applicable work product and attorney-client protections, largely on the basis of its finding that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales and many other things." (App. 8.) Accordingly, the court found that materials reflecting aggregate and average case reserves should be deemed to be ordinary business documents.

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[7] Indeed, to the extent that reserve documents can be said to relate to the possibility of settlement, Rule 408 of the Federal Rules of Evidence precludes their evidentiary use.

This doctrine, if allowed to stand, would constitute the exception that swallows the rule that litigation documents ordinarily are entitled to protection. There is no discernible principle to support a conclusion that if a company happens—for whatever reason—frequently to be engaged in litigation, its otherwise protected documents lose their confidential status.[8]

Ironically, the effect of this novel principle is that the protection afforded to a company's litigation-related deliberations diminishes as the importance of the litigation increases. The company involved in an isolated, idiosyncratic lawsuit can escape the disclosure-forcing determination that it is "in the business of litigation" incidental to its main pursuits. However, the industrial company confronted by mass tort litigation, fighting for its corporate survival in the face of hundreds, thousands or tens of thousands of similar claims,[9] is denuded of the nor-

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[8] Indeed, in *FTC v. Grolier, Inc.*, 462 U.S. 19, 31 (1983), Justices Brennan and Blackmun stressed in their concurring opinion that:

> Any litigants who face litigation of a commonly recurring type—liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on—have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes.

As that concurring opinion also noted, the United States Government is perhaps the most obvious example of a participant in similar, recurring litigation. 462 U.S. at 30-31. Extending the lower court's logic, one must conclude that government enforcement agencies, like the other private concerns identified, are in the "business of litigation" and therefore are not entitled to invoke work product or attorney-client protection for any litigation (*i.e.*, "business") document.

[9] Several large, prominent corporations have been forced into bankruptcy by mass tort claims. *See, e.g., A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir.) ("[c]onfronted, if not overwhelmed, with an avalanche of actions . . . seeking damages for injuries allegedly sustained by the use of . . . a Dalkon Shield, . . . A.H. Robins filed its petition under Chapter 11"), *cert. denied*, 107 S. Ct. 251 (1986).

mally routine privileges as to some of its most sensitive litigation-related judgments precisely because of the magnitude of the claims against it. Similarly, the insurer whose business includes managing litigation for its numerous policyholders, and whose commercial success depends on its skill in performing that role, would seemingly be denied rudimentary protection for its litigation-related communications under this approach precisely because its litigation is so important to its operations.

The fact that insurance companies are engaged in the business of litigation has not previously led to a judicial conclusion that their work product and privileged documents thereby lose their confidential status. To the contrary, courts have recognized that, while insurers initially manage claims presented to them as a business matter, the time often comes when "an insurance company's activity shifts" to the anticipation of litigation. At that point, documents prepared by claims personnel in anticipation of litigation are afforded standard work-product protection. *See Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982).

This protection has specifically been recognized in the context of, and applied to, reserve information. For example, *Union Carbide Corp. v. Travelers Indemnity Co.*, 61 F.R.D. 411 (W.D. Pa. 1973), denied discovery of reserve information, both because the information was protected and because it was irrelevant. The court held that the Federal Rules of Civil Procedure:

> do not render discoverable the internal opinions and conclusions [the insurer] has reached in evaluating the reserves in issue. . . . [W]e do not believe that the proper end of discovery—expedition of the litigation either by narrowing the area of controversy or by avoiding unnecessary testimony or by providing a lead to evidence—will be served by allowing discovery of the reserves in question.

61 F.R.D. at 413.

The protection for reserve information is rooted in sound principles of litigation fairness and public policy. First, *Hickman v. Taylor*, 329 U.S. 495 (1947), and its progeny reflect the fundamental unfairness of placing a party in a position in which its confidential assessments of liability and ongoing litigation are in the hands of its adversary who may use them in settlement negotiations, in deciding to bring additional claims, or, even more unfairly, before a fact-finder. Litigants must have the ability to be candid with themselves in order to prepare an adequate defense and consider the possibility of settlement.

The Eighth Circuit's "business involves litigation" approach thus poses a grave threat both to important litigation protections and to the vital reserve-setting process of the insurance industry. The Eighth Circuit's decision requires the grant of certiorari to permit full consideration of these issues by this Court.

III. The Court's Supervisory Role

If the Court grants certiorari, it also could resolve conflicting case law governing the discoverability of reserves and provide the lower courts with guidance in addressing the complex discovery problems surrounding reserve information. Establishing the relevant standards is crucial because, as this Court has recognized, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). The relatively few courts that have considered these issues have reached directly conflicting results.

For example, in a recent decision involving insurance coverage in the hazardous waste context, the United States District Court for the District of Columbia denied a motion to compel the production of reserve informa-

tion.[10] *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, No. 83-3347 (D.D.C. Mar. 9, 1987).[11] At the same time, the *Independent Petrochemical* court recognized that the authorities are "scant and . . . evenly split." *Id.*, slip op. at 6. In one case granting access to reserve information, the difficulty encountered by the Magistrate deciding the issue—and the lack of guidance available to him—was obvious from his words on a motion to reconsider the ruling:

> As you know, I had a great deal of difficulty in ultimately resolving this issue. . . . I am not certain I am right now. I don't know if there is a right answer. But certainly there are conflicting views from different courts and that is obvious.

Maryland Casualty Co. v. W.R. Grace & Co., 83 Civ. 7451 (SWK) (S.D.N.Y.) (Tr. of hearing of June 15, 1987).[12]

The issues presented are likely to arise in many mass tort cases and other product liability litigation. These cases constitute a large and rapidly expanding category of the federal court docket.[13] Although the personal injury cases are numerous, the opportunity this case presents to the Court is an unusual one. Indeed, this is the

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[10] Similarly, *Union Carbide Corp. v. Travelers Indemnity Co.*, 61 F.R.D. 411 (W.D. Pa. 1973), provided unequivocal protection for reserve information.

[11] A copy of this unpublished opinion has been lodged with the Clerk of the Court.

[12] A copy of this transcript excerpt has been lodged with the Clerk of the Court.

[13] The Administrative Office for United States Courts reports that in the five years ending June 30, 1987, 56,814 product liability personal injury cases, many of which were mass tort cases, were filed in the federal courts. The number of new filings jumped from 8,026 in 1982-83 to 14,145 in 1986-87. Asbestos cases, which were not even separately tracked in 1982-83, increased from 2,788 in 1983-84 to 7,774 in the last year.

first case to our knowledge where the discoverability of reserve information has been addressed by any appellate court. These matters typically arise in discovery disputes, and normally are resolved prior to trial in the district courts, often by magistrates or special masters. It is the rare case that will proceed through appeal with the reserves issue intact and preserved. Accordingly, AIA urges the Court to take this available occasion to establish the protections available to reserve information.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Insurance Association urges the Court to grant the requested writ of certiorari.

Respectfully submitted,

THOMAS W. BRUNNER *
JEFFREY F. LISS
LAURA A. FOGGAN

PIPER & MARBURY
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 785-8150

Attorneys for Amicus Curiae
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